

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.453 OF 1989.**

Suresh Shankar Katkar
res. at Kasewadi Zopadpatti,
Behind Sonmarg Talkies,
Bhawani Peth,
Pune

..Appellant

versus

State of Maharashtra

..Respondent.

Mr.Prakash Naik for the Appellant

Mr.P.S.Hingorani, APP for the State

Coram : D.G.Deshpande &
S.R.Sathe, JJ.
Dated : 5th March, 2007

JUDGMENT (PER S.R.SATHE, J).

1. Appellant, the original accused has preferred this appeal against the judgment and order passed by the Court of Additional Sessions, Judge, Pune in Sessions Case No.171 of 1988 whereby the accused was convicted for the offences punishable under Section 302 of I.P.C. and sentenced to suffer imprisonment for life and for offences punishable under Section 201 and 342 of I.P.C. to suffer R.I. for three years and six months respectively.

2. Brief facts giving rise to this appeal are as under:

. Deceased Chhaya Suresh Katkar was residing with her husband i.e. accused at Kasewadi Zopadpatti, Bhavani Peth, Pune. The accused had suspicion about the character of the deceased and he was suspecting that deceased had illicit relation with his cousin brother Ashok. On that count there often used to be quarrel between them.

3. On 14.12.1989 at about 5.0 p.m. quarrel took place between accused and deceased. Accused asked deceased to go and stay with Ashok. As she denied, the accused poured kerosene on her person and set her on fire. When deceased raised shouts the neighbours broke open the door and extinguished the fire. Thereafter the accused took the deceased to Sasoon Hospital and gave information that deceased sustained burn injuries due to sudden burst of the stove. When Medical Officer made query with the deceased, she gave history of assault at the hands of accused and also told that he poured kerosene on her person and set her on fire. When PSI Joshi received information about the admission of deceased in burnt condition, he went to the Special Executive Magistrate, Retawale and took him to Sasoon Hospital. The Special Executive Magistrate then

recorded the dying declaration wherein also deceased told that accused poured kerosene on her person and set her on fire. PSI Joshi also recorded statement of Chhaya, and on the basis of the said statement registered crime at C.R.No.295 of 1987 for the offences punishable under Section 307, 342 and 201 of I.P.C.

4. Injured Chhaya succumbed to the burn injuries on 15.12.1987 at about 3.45 a.m. Police then drew the inquest panchanama and sent the dead body for post mortem. Doctor opined that the death was caused due to shock and as a result of burn injuries. Police therefore registered the offence under Section 302 of I.P.C. On the next day morning police visited the place of offence and drew the panchanama of the place of offence. They also recorded the statement of various witnesses. In the meantime accused was arrested on the day of the incident at about 10.15 p.m. After completion of investigation police submitted chargesheet in the Court of J.M.f.C.Pune. Finding that the accused was chargesheeted for the offence which was exclusively triable by the Court of Sessions, the learned JMFC committed the case to Sessions Court, Pune.

5. The learned Addl. Sessions Judge framed charge Exhibit 2 against the accused for the offences mentioned above. The charge was read over and explained to the accused. The accused pleaded not guilty and claimed to be tried. From the suggestions put to prosecution witnesses and from the statement of accused recorded under Section 313 Cr.P.C. it appears that the defence of the accused was of total denial. According to him on the day of the incident Chhaya wanted to go to her maiden home, but accused asked her to prepare food. She, therefore, went inside and started cooking by closing the door. After sometime he heard her shout. The neighbours rushed and broke open the door and then the brother of the accused took Chhaya to Sasoon Hospital.

6. In order to bring home the guilt of the accused, prosecution examined in all five witnesses consisting of P.W.1 Dr. Jayram Sonone - Exhibit 15, P.W.2 Special Executive Magistrate R.S.Retawade - Exhibit 19, P.W.3 Rukhmini Adgale -Exhibit 21, P.W.4. PSI Ajit Joshi - Exhibit 22 and P.W.5 I.O. Prabhakar Shukla - Exhibit 24. The prosecution also

produced the panchanama of the place of offence - Exhibit 11, arrest panchanama of the accused -Exhibit 12, Post mortem notes Exhibit 12-A, inquest panchanama -Exhibit 13, dying declaration -exhibit 18, C.A. report Exhibit 25 and 27.

7. After considering the evidence on record, the learned trial judge came to the conclusion that the dying declaration of the deceased is sufficient to prove the charge levelled against the accused. Relying on the said dying declaration the learned trial Judge convicted the accused for the offence mentioned above and sentenced him accordingly.

8. Being aggrieved by the said judgment and order the accused has filed the present appeal. In this appeal before us Shri Prakash Naik, learned Advocate for the accused has urged only two points. Firstly, he submitted that the case rests solely on the dying declaration of deceased, but the same appears to be doubtful considering the other evidence on record. He also canvassed before us that the accused was in fact not in a position to walk at that time and it is difficult to believe that in such condition he would be able to pour

kerosene on the person of the deceased and set her on fire. He also argued before us that the accused had in fact taken the injured to the hospital. He therefore submitted that the dying declaration appears to be doubtful and is not supported by any other evidence and as such order of conviction is not legal and correct. He, therefore, submitted that the appeal be allowed and the order passed by the learned trial judge be set aside and accused be acquitted. As against this, Shri Hingorani, learned APP strenuously argued before us that the dying declaration is recorded by the Special Executive Magistrate. There is no reason for him to state that the deceased had made such statement before him. Nor there was any reason to doubt the credibility of the said dying declaration. He, therefore, submitted that the appeal be dismissed.

9. It is not in dispute that accused and deceased Chhaya were residing together at Kasewadi alongwith their children. It is also not in dispute that on the night of 14.12.1987 Chhaya was admitted in hospital and at that time she had sustained 95% burn injuries. Admittedly, she died as a result of the said burn injuries.

10. It is the prosecution case that the said burn injuries were caused at the hands of the accused. While it is tried to be suggested on behalf of the defence that the burn injuries were suicidal or accidental. So, we have to find out whether there is sufficient evidence to hold that the burn injuries were caused at the hands of the accused.

11. Admittedly, the prosecution case rests solely on the dying declaration. There are three dying declarations, one in the nature of statement given by the deceased before doctor when she was admitted in the hospital, the second dying declaration is recorded by Special Executive Magistrate and the third which is recorded by the P.I. in the form of complaint. It is true that in all the above mentioned three dying declarations the deceased has stated that at the relevant time the accused beat her and set her on fire. It is needless to say that the law regarding dying declaration is well settled. There are various authoritative pronouncements in which it has been held that if the dying declaration is true and

reliable then conviction can be passed even on the dying declaration and no corroboration is necessary. Merely because in the instant case the three dying declarations are consistent with each other and recorded soon after the incident, one can't come to the conclusion that the same are true and correct and conviction can be passed on the sole evidence of dying declaration.

12. It must be noted that there are some discrepancies in the said dying declarations. In the dying declaration Exhibit 18 which is recorded by the Special Executive Magistrate, the injured has stated that on the day in the evening at about 5 p.m. the accused assaulted him and then he removed her sari and told her to go out of the house in naked condition, but she did not. Hence, accused poured kerosene out of the stove on her and set her on fire. In that very dying declaration at the end it is stated that after the accused had removed her sari, he had again asked her to wear the same. However, if we see the dying declaration recorded by the P.I. which is subsequent to the dying declaration, Exhibit 18 and which is more in detail, she has not stated anything about the incident of

sari. Similarly, in the dying declaration which is executed by the Special Executive Magistrate, the injured had only stated that her husband had suspicion about her behaviour while in the complaint it is mentioned that she told Police Inspector that her husband had suspicion that she had illicit relations with the brother of the accused. From the dying declaration it appears that according to deceased her husband was suspecting her character and on that ground used to beat her. If really it would have been so then normally deceased would have told about this to her parents and near relatives. But there is absolutely no evidence in that behalf. It is pertinent to note that in both these dying declarations it is mentioned that her husband admitted her to Sasoon Hospital.

13. Incidentally, it must also be seen that in the case paper also it is mentioned that husband of the injured admitted her in the hospital. The prosecution has produced at Exhibit 14 the entry in the said station dairy. It is dated 14.12.1987 at 7.20 p.m. The said entry is made on the basis of phone call received from the police constable Kashid who was on duty at the relevant time at Sasoon

Hospital. From the said entry it appears that the said police constable had received the information about the injured from Dr. Ugadhe, who had received the information in turn from Suresh Katkar i.e. the present accused wherein it is mentioned that Chhaya received burn injuries as a result of the sudden burst of stove. If really the injured would have given information about the incident to doctor and told the doctor that her husband poured kerosene on her person as alleged by the prosecution then normally there was no reason for having such station dairy entry. Ofcourse, we find that the name of the doctor mentioned in the said station diary and the name of the doctor who examined her and whose evidence is adduced by the prosecution at Exhibit 15 are different persons. In station dairy there is reference of Dr. Ugadhe while the doctor who has examined is Dr. Sonone. But the fact remains that the evidence adduced by the prosecution in the form of station dairy entry is not consistent with the other evidence, namely the history given by the injured to the doctor as well as the dying declaration exhibit 18. Naturally, this creates some doubt about the prosecution version.

14. It is well settled that dying declaration must be dealt with caution for the reason that the maker of the statement was not subjected to cross examination. There is no rule of law or rule of prudence that dying declaration cannot be accepted unless it is corroborated. But the question arises, whether corroboration is not necessary even when the other circumstances of the case are not supporting the dying declaration. In fact it is well settled that it is only if the circumstances surrounding the dying declaration are not clear or convincing that the court may, for its assurance look for corroboration to the dying declaration. In our opinion, in the instant case there are some such circumstances one of which is mentioned above, which goes to show that this is not a case where the court should not look for the corroboration to the dying declaration.

14. It is an admitted fact that on the date of incident one leg of the accused was fixed in still rod stand and as a result of the same he was not in a position to walk properly. According to prosecution, on that day the deceased wanted to go to her maiden home, but accused had refused and on

that count there was some quarrel. The case with regard to quarrel is even supported by the neighbour Rukhmini Adgale- Exhibit 21. However, the said witness has been declared hostile because according to her when Chhaya sustained burn injuries accused was not inside the room, but on the contrary he was standing outside. The said witness has stated that at the relevant time the quarrel took place and thereafter deceased went inside the house and pushed the door forcibly. While considering this aspect and the say of the accused one has to see the panchanama of the place of offence which is at Exhibit 11. In this panchanama it is mentioned,

So, it is clearly mentioned in this panchanama that the door was having only one plank and the hinges were found to be broken, so also planks of the door

were broken and lying inside the room. Witness Rukhmini Adgale has specifically stated that at the relevant time when Chhaya sustained burn injuries, after break opening the door, the accused went inside and put the quilt on the person of the deceased. So, this statement of the witness Rukhmini Adgale in a way is corroborated even by the panchanama. Naturally, the question arises what was the necessity of break opening the door. One may argue that the accused while committing the offence might have latched it from inside, but then there is absolutely no evidence to that effect. Even in the dying declaration it is not the say of Chhaya that accused had bolted the door from inside. On the contrary, we find that at the relevant time the accused was outside the door. Even if we assume for the sake of argument that at that time he had latched the door from outside, still then there was no necessity to break open the door. What is more to be noted is that on the next day when the panchanama was drawn the door was found locked and it is specifically mentioned in the panchanama that the brother of the accused gave key, but it is not at all the case of the prosecution that when the alleged incident took place the door was locked from

outside by anybody. According to witness Adgale, Exhibit 21 the accused was also standing outside the door when the alleged incident took place. So, all this clearly creates some doubt about the dying declaration. So, this important circumstance of the neighbours requiring to break open the door and then entering into the room puts us on guard, and as a result of the same in our considered view this is a fit case where the prosecution must adduce some corroborative evidence to the dying declaration. However, there is no such corroboration. On the contrary, the circumstances, are against the dying declaration. It is well settled that when such is the position, benefit of every reasonable doubt has to be given to the accused.

15. It was tried to be argued on behalf of the prosecution that at the relevant time accused was wearing lungi and banian and they had kerosene smell. However, if we see the C.A. report- exhibit 25 we find that it is clearly mentioned that no residue of kerosene were found on the lungi and banian. So, there is no substance in the argument advanced by the learned APP in this behalf.

16. From the perusal of the trial courts judgment it appears that the trial court has not taken into consideration the important circumstance mentioned above and the trial court ought to have held that this is a case where there should have been some corroboration to the dying declaration. The evidence given by the neighbour Rukhmini Adgale was not consistent with the dying declaration. The evidence of panchanama on which prosecution is relying is also not consistent with the dying declaration and it in fact creates some doubt about the prosecution version. We, therefore, feel that benefit of above reasonable doubts must be given to the accused and the order of conviction based solely on dying declaration is no legal and correct under the circumstances of this case. Hence, we pass the following order.

ORDER

. Appeal is allowed.

. The order of conviction and sentence passed against the accused is set aside. The accused is acquitted of the offences punishable under Section

302, 201 and 142 of I.P.C.

. His bail bond stands cancelled.

(D.G.Deshpande, J.)

(S.R.Sathe, J.)